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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 478

ARNOLD ROMANO and DOMINICK ROMANO,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 1, 1970

Washington, D. C. THIEL PRESS 202 393 0625

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners Arnold Romano and Dominick Romano respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on January 29, 1970.

OPINION BELOW

The opinion of the Court of Appeals is reported in 421 F.2d 792 (1970), and is printed in the Appendix hereto.

No opinion was rendered by the District Court for the Southern District of New York.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on January 29, 1970. A timely petition for rehearing en banc was denied on June 2, 1970. On June 23, 1970, Mr. Justice Harlan issued an order extending the time within which to file this petition for a writ of certiorari to August 1, 1970. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the "all-or-nothing" jury charge in conspiracy cases, which precludes the jury from focusing on the scope of each defendant's involvement, denies a fair trial to one who has a defense that is not shared by his co-defendants?

2. Whether a defendant in a conspiracy case is denied the right to counsel when he is forced to trial, in the unexpected and sudden absence of his retained counsel, with an attorney whom he does not desire, who is unprepared, and who is under subpoena to testify against him?

3. Whether the accused waives his right to a speedy trial, despite two years' delay between arrest and prosecution, by failing to make a formal demand?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime

shall have been committed . . . and to have the Assistance of Counsel for his defence.

21 U.S.C. § 173 (1958):

> It is unlawful to import or bring any narcotic drug into the United States . . .

21 U.S.C. § 174 (1958):

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

* * *

STATEMENT OF THE CASE

On April 15, 1969, petitioners were found guilty, after a jury trial, of conspiracy to violate the Narcotic Drugs Import and Export Act, 21 U.S.C. §§ 173, 174. The indictment on September 20, 1964, accused 28 persons (12 of whom were indicted) of conspiring to import large amounts of heroin from France between 1956 and 1960. In 1965, six defendants were tried, of whom four were convicted. *United States v. Armone*, 363 F.2d 385 (2 Cir.), *cert. denied*, 385 U.S. 957 (1966). The convictions of which petitioners now seek review resulted from the trial of a second group of four defendants in March, 1969.

Petitioners were alleged to have been among a group of importers that sold heroin for wholesale distribution in the United States. Upon conviction, petitioner Arnold Romano was sentenced as a multiple offender to thirty years in prison and fined $5,000, and petitioner Dominick Romano was sentenced to twenty years in prison and fined $5,000 (JA 1176a, 1192a).[1]

1. *Single or Multiple Conspiracies.* The Government's case rested largely on the testimony of Hedges, a go-between who delivered and received heroin and cash for various importers. The testimony was sufficient to show a huge conspiracy between French exporters and their couriers and American wholesale distributors. But this same evidence showed two different import groups, one being replaced by the other during the crucial period of 1959 when the statute of limitations bar took effect." (See record citations, notes 10, 11, *infra*).

Petitioners thus claimed that the evidence showed two conspiracies. The primary conspiracy was between the exporters, couriers, and wholesaler-distributors, and continued beyond the date of the statutory bar. There was also a subordinate conspiracy among a group of men, including petitioners, to perform import functions. However, that import group, headed by Cahill, was replaced in 1959 by another, the Calamaris group. The Government, on the other hand, claimed that there was only one, over-all conspiracy, that Cahill and Calamaris were minor figures, and that there were not two different import groups, one ending prior to the statutory bar.

However, the trial court never instructed the jury on the defense theory of two different conspiracies as described above. Had the jury been so instructed, it could have acquitted the petitioners while finding the other defendants

[1] "JA" refers to the Joint Appendix printed on appeal to the Court of Appeals, a compact three-volume record, certified to this Court.

guilty. Instead, the trial court instructed the jury that if the Government's evidence showed more than one conspiracy, all the defendants must be acquitted. (Appendix, Slip Op. 1262) In addition, the court mis-instructed the jury on the defense of petitioners Arnold and Dominick Romano, stating that their claim was that the over-all conspiracy ended before the date of the statutory bar. (JA 1095a, 1097a).

The jury was thus not presented with the possibility of finding some defendants guilty, as members of the overall conspiracy that the evidence clearly showed, and finding petitioners innocent as members of a different, subordinate conspiracy that ended prior to the statutory bar.

2. *Right to Counsel.* On the day that the trial was scheduled to commence, the attorney (Querques) who had been retained by petitioner Arnold Romano 5½ months earlier, and who had made four pretrial appearances in the case, was suddenly and unexpectedly detained in another court and could not appear. The record shows that this occurred without warning and without any fault or negligence on the part of either Querques or petitioner. (See App., Slip Op. 1252; JA 340-346; 189-90; 16a).

Despite the complexity of the case and the difficulty of defense in a conspiracy trial, the trial court denied petitioner Arnold Romano a continuance to enable him to check up on Querques or arrange for other counsel. Instead, the trial court ordered into court, and appointed to represent petitioner, an attorney, Markowitz, who: (1) was under subpoena as a government witness against petitioner (JA 53a-54a); (2) had previously unsuccessfully represented petitioner and had been discharged for what petitioner regarded as incompetence (JA 49a); and (3) stated that he was unprepared, unwilling, and unable to represent petitioner Arnold Romano (JA 14a, 55a, 57a).[2]

[2] The trial court took this action because Markowitz had permitted Querques to use his name for local mailing purposes as required by Southern District Rule 4(a) (JA 12a-13a, 18a).

Petitioner Arnold Romano refused to permit Markowitz to represent him and attempted to stand mute. (See, e.g., JA 16a-17a, 32a-33a). Hence there was no evidence or cross examination on petitioner's behalf. However, the trial court, over petitioner's protests, forced Markowitz to participate and to make a summation (JA 31a-33a, 960a) which, due to the mis-statement of a crucial date relating to the statute of limitations defense, was damaging to petitioner (JA 157a, 162a, 967a).

The Court of Appeals, without citation, refers to "somewhat analogous fact situations" in which convictions have been affirmed. (App., Slip Op. 1251) As we shall show, there is no analagous situation in several dozen federal decisions dealing with the last minute non-appearance of retained counsel.

3. *Speedy Trial.* The delay between petitioner Arnold Romano's arrest and prosecution was two years (JA N.Q). However, the Court below held that there was no denial of the right to speedy trial on the ground that Romano had made no "demand." Although Romano "urged" that the case go forward (App., Slip Op. 1256-57) and filed a *pro se* motion to dismiss (JA 62,75), the Court did not consider these efforts adequate to constitute a demand and thereby to avoid waiver of the right.

REASONS FOR GRANTING THE WRIT

I. The Court should review the "all-or-nothing" jury charge which precludes individualized determinations of guilt or innocence in conspiracy trials—an issue this Court has not addressed since 1947.

The severe and continuing criticism of conspiracy prosecutions focuses on the difficulty that an individual defendant has in getting the jury to consider his case and the evidence against him as distinct from the other defendants and the evidence against them.[3]

Conspiracy prosecutions are burgeoning, the Courts of Appeals have failed to develop a satisfactory and uniform set of rules to deal with the issues,[4] and this Court has not addressed the problem for more than twenty years.[5]

[3]See *Krulewitch v. United States*, 336 U.S. 440, 445, 454 (1949) (Jackson, J., concurring, referring to "that elastic, sprawling and pervasive offense"); *Grunewald v. United States*, 353 U.S. 391; 404 (1957) (Harlan, J., referring to the "pervasive and widesweeping nets of conspiracy prosecutions"); *Delli Paoli v. United States*, 352 U.S. 232, 246-47 (1957) (Frankfurter, J., dissenting). See, also, Wechsler, Jones & Korn, The Treatment of Inchoate Crimes in the Model Penal Code, 61 Colum. L. Rev. 957-58 (1961); Note, Developments in the Law - Criminal Conspiracy, 72 Harv. L. Rev. 920, 980 (1959); Note, The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants, 62 Harv. L. Rev. 276-77, 282, 284 (1948).

[4]See Wechsler, Jones & Korn, op. cit. supra note 3, at 980.

[5]The Court last dealt with the "dangers of transference of guilt from one to another across the line separating conspiracies" in *Kotteakos v. United States*, 328 U.S. 750, 774 (1946). See, also, *Blumenthal v. United States*, 332 U.S. 539, 559-60 (1947); *Fiswick v. United States*, 329 U.S. 211 (1946). The more recent decision in *Schaffer v. United States*, 362 U.S. 511 (1960), dealt with the related but different problem of joinder where no conspiracy is shown. In *Grunewald v. United States*, *supra*, and *Krulewitch v. United States*, *supra*, the narrower question before the Court was whether a "conspiracy to conceal" supported the admission of post-conspiracy declarations.

The instant case presents a unique and timely opportunity for this Court to deal broadly with the problem of protecting individual defendants' rights in conspiracy trials, for three reasons:

First, this case raises the problem in the form that it most often and drastically arises, namely, the question of the scope of conspiratorial agreements in cases in which either one or several conspiracies might be inferred from the evidence.[6] In *Grunewald v. United States*, 353 U.S. 391, 397 (1957), the Court recognized that this problem becomes most crucial where, as in the instant case, the protection of the statute of limitations will turn on whether there was one conspiracy running beyond the statutory bar, or several conspiracies, one of which ceased before the bar.

Second, this case involves evidence of organized crime unrelated to political issues, a case in which the law of conspiracy is "appropriately invoked",[7] and one in which the Court can deal directly with the problem of individualized justice without the diverting complications of freedom of speech and association.[8]

Third, as in all large conspiracy prosecutions, this case includes a mass of tangled evidence and events raising questions as to which of various defendants were involved and to what extent. However, unlike other mass conspiracy cases, the issue of individualized justice, as raised by the trial court's instructions to the jury, is simple and unclut-

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[6]See *Kotteakos v. United States*, *supra*, 328 U.S. at 776; Wechsler, Jones & Korn, op. cit. *supra* note 3, at 979, 980, 991-94; Note 72 Harv. L. Rev. op. cit. *supra* note 3, at 991.

[7]In *Krulewitch v. United States*, *supra*, 336 U.S. at 448, Justice Jackson drew a distinction between conspiracy prosecutions of "politically motivated" crimes, and those in which conspiracy is "appropriately invoked."

[8]See Note, Criminal Law Criminal Conspiracy and Political Dissent, 44 Tul. L. Rev. 587, 589, 590, 593-94 (1970). Cf., *United States v. Spock*, 416 F.2d 165, 169 (1 Cir. 1969).

tered: the trial court instructed the jury that it could not convict *any* of the defendants unless it found a single conspiracy, but that in that event it must convict *all* who were to any extent involved. The court never gave the jury the chance to consider the possibility asserted by the defendants, namely, that there were two conspiracies, only one of which continued beyond the cut-off date of the statute of limitations. Such a charge would have permitted conviction of the other two defendants and acquittal of the Romanos.

Hedges, the Government's chief witness, testified in a rambling, "hodge podge" fashion to more than fifty transactions and events taking place between 1956 and 1960, involving various defendants among the cast of 28 conspirators. His testimony as to dates was grossly and pervasively inexact, with crucial dates changing or uncertain in his testimony.[9] The testimony gave substantial support to the contention of petitioners Arnold and Dominick Romano that they were connected only with an import group conspiracy, headed by Cahill, and subsidiary to the principle conspiracy.[10] The evidence also supported their contention that the Cahill group was ousted prior to September, 1959, the statute of limitations cut-off date, and the subsidiary conspiracy then terminated, while the overall conspiracy, with a new import group headed by Calamaris, continued.[11]

However, rather than instruct on the possibility of subsidiary conspiracies, the trial court, in the words of the Court of Appeals in affirming the convictions, "charged the jury that all of the defendants must be acquitted if more than one conspiracy had been proved or if a single conspiracy did not continue beyond September 30, 1959." (App., Slip Op. 1262).

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[9] See, e.g., JA 124a(1), 125a, 236a, 243a, 244a.

[10] See, e.g., JA 88a-95a, 105a-107a, 110a-113a, 118a-124a, 137a, 164a-165a, 225a, 236a-239a.

[11] JA 103a-104a, 507a, 548a-549a, 557a-558a, 640a, 643a-646a.

This is the very "all-or-nothing" charge that has twice previously been condemned by the Second Circuit, and that has been condemned by the Seventh Circuit.[12] Its vices are that: (1) it fails to "appropriately focus the jury's attention" on the "scope of the agreement made by a particular defendant";[13] and (2) it compels the jury to tie all the defendants together, convicting those whom it may believe innocent in order to convict those who are clearly guilty.[14]

A proper instruction would have focused the jury's attention on the scope of any agreement attributable to each of the petitioners by presenting the possibility of finding two chains of conspiracy, one overall and continuing (but for the replacement of a link), and the other ending when that link was removed, prior to the statutory bar. Thus, the jury could have convicted Guanti and Sherbicki but acquitted Arnold and Dominick Romano.

There could be no more striking illustration of the prejudicial sweep of the all-or-nothing charge in a conspiracy prosecution than the effect on petitioner Dominick Romano, who was clearly a peripheral figure. Dominick had no prior involvement in crime, and there were but four scant references to him in the voluminous government testimony (JA 88a-94a, 114a-116a, 164a-165a). After 11 hours of deliberation, the jury asked for the transcript of the summation of Dominick Romano's counsel (JA 1160a), which had focused on the scope of his involvement and the statute of limitations. (JA 954a-959a). This request was denied, a supplemental charge reinforcing the all-or-nothing

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[12] *United States v. Borelli*, 336 F.2d 376 (2 Cir. 1964), *cert. denied*, 379 U.S. 960 (1965); *United States v. Kelly*, 349 F.2d 720 (2 Cir. 1965), *cert. denied*, 384 U.S. 947 (1966); *United States v. Varelli*, 407 F.2d 735, 743-44 (7 Cir. 1969).

[13] *United States v. Borelli*, *supra*, 336 F.2d at 386, n. 4.

[14] *United States v. Kelly*, *supra*, 349 F.2d at 757-58.

theme was given, and the jury returned in less than 20 minutes with across the board convictions. (JA 1160a-1166a).[15]

In the *Borelli* case, the Second Circuit created a rule that could have been of profound importance to the development of conspiracy law:

> "[W]here the evidence is ambiguous as to the scope of the agreement made by a particular defendant and the issue has practical importance, the court must appropriately focus the jury's attention on that issue rather than allow it to decide on an all-or-nothing basis as to all defendants." *United States v. Borelli*, 336 F.2d at 386, n. 4.

In this case the Second Circuit has effectively overruled *Borelli*, and *United States v. Kelly*, *supra*, which followed it, by limiting those cases to their "specific fact situations" and warning against reliance on those cases "as a guide or standard for general future use in conspiracy cases." (App., Slip Op. 1262).[16]

The dangers inherent in conspiracy prosecutions have been repeatedly emphasized by this Court and others. It is therefore "extremely important that . . . safeguards be made as impregnable as possible" *Blumenthal v. United States*, *supra*, 332 U.S. at 559-60. The *Borelli* rule is indispensable because it ensures individual consideration in conspiracy trials by carefully focusing the jury's attention

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[15] On the critical importance of supplementary instructions, see *Bollenbach v. United States*, 326 U.S. 607, 613 (1946); *Fiswick v. United States*, *supra*, 329 U.S. at 220.

[16] The Court of Appeals' opinion attempts to distinguish *Borelli* by pointing to instructions that the jury must consider whether each defendant joined the conspiracy (App., Slip Op. 1262). Identical charges were given in *Borelli* (62 Cr. 790, S.D.N.Y., R. 3217-20, 3270-72), but such an instruction fails to focus on the *scope* of each defendant's agreement. The Court also stated that the facts here presented a different picture than in *Borelli* (Slip Op. 1262-63); but the narcotics conspiracies are almost identical, and an import figure, Locascio, was granted a new trial in the *Borelli* case.

on the scope of each individual defendant's agreement. This Court should therefore review the decision in this case to consider establishing the *Borelli* rule as an essential safeguard in federal conspiracy trials.

II. The decision below, affirming a conviction where the accused was forced to trial upon the sudden failure of his retained counsel to appear, is inconsistent with a standard that is implicit in dozens of decisions of the Courts of Appeals, but that has not yet been clearly articulated.

The right to counsel guaranteed by the Sixth Amendment includes the right to select counsel of one's own choosing, and a fair opportunity to make a selection.[17]

The Court has twice recently considered the problem of whether an accused had adequate time to obtain prepared counsel.[18] However, not since *Glasser v. United States*, 315 U.S. 60 (1942), has the Court considered the rights of an accused when, without warning, his retained attorney fails to appear at trial. The issue is a timely one for review by this Court because: (1) the problem is a chronic and recurring one; (2) the *Glasser* opinion gave no general guidance on the problem; and (3) in the three decades since *Glasser*, a pattern of federal decisions has emerged which would permit the formulation by this Court of a much needed set of standards.

The instant case is particularly fitting for these purposes. The last-minute unavailability of counsel, who had spent months meticulously preparing trial strategy and coordinat-

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[17] *Reynolds v. Cochran*, 365 U.S. 525, 530-31 (1961); *Chandler v. Fretag*, 348 U.S. 3, 9-10 (1954); *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

[18] *Chambers v. Maroney*, 38 U.S.L. Week 4547 (1970) (no prejudice shown despite appointment only few minutes before trial; Harlan, J., dissenting); *Ungar v. Sarafite*, 376 U.S. 575 (1964) (5 days sufficient to retain counsel where issues are simple and fresh).

ing with other defendants' counsel, arises here as it did in the *Glasser* case in a conspiracy trial? Conspiracy trials present in their most exacerbated form the conflicting needs, first, to avoid undue delay, and second, to assure prepared counsel of the defendant's choice.

> "In conspiracy cases, where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant, it is especially important that he be given the benefit of the undivided assistance of his counsel . . . ." *Glasser v. United States*, 315 U.S. at 76.

Several dozen federal decisions have produced a pattern that can be formulated into a standard that could expedite the administration of justice in the hundreds of trials each year in which this problem arises. This formulation is as follows. If the non-appearance of an accused's chosen counsel is his own fault, whether through deliberate delay or mere lack of diligence in retaining available counsel, a continuance may be denied and the court may appoint another attorney and proceed to trial.[19] If, however, the non-appearance of the retained attorney is due to neither dilatory tactics nor lack of diligence by the accused, he

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[19] *Deliberate delay.* See, e.g., *United States v. Abbamonte*, 348 F.2d 700 (2 Cir. 1965), *cert. denied*, 382 U.S. 982 (1966); *United States v. Bentvena*, 319 F.2d 916 (2 Cir.), *cert. denied*, 375 U.S. 940 (1963); *Leino v. United States*, 338 F.2d 154 (10 Cir. 1964); *Cleveland v. United States*, 322 F.2d 401 (D.C. Cir.), *cert. denied*, 375 U.S. 884 (1963).

Lack of diligence. See, e.g., *United States ex rel. Carey v. Rundle*, 409 F.2d 1210, 1215 (3 Cir. 1969); *United States v. Jones*, 369 F.2d 217 (7 Cir. 1966), *cert. denied*, 386 U.S. 944 (1967); *United States v. Cozzi*, 345 F.2d 637 (7 Cir. 1965), *cert. denied*, 383 U.S. 911 (1966); *United States v. Dardi*, 330 F.2d 316, 335 (2 Cir.), *cert. denied*, 379 U.S. 845 (1964); *United States v. Arlen*, 252 F.2d 491 (2 Cir. 1958); *Griffiths v. United States*, 172 F. Supp. 691 (Ct. Cl.), *cert. denied*, 361 U.S. 865 (1959); *Raullerson v. Patterson*, 272 F. Supp. 495 (D. Colo. 1967).

must be allowed a brief but reasonable continuance to retain new counsel who can prepare for trial.[20]

The equities in favor of granting petitioner Arnold Romano a short time to obtain new and prepared counsel of his choice were greater than in any of the cases cited in note 20, *supra*, in which convictions were reversed. Petitioner discharged his former attorney, Markowitz, dissatisfied with his services (JA 49a), and so informed the court more than 6 months before trial (JA 332-334). Querques, the new attorney, appeared and vigorously participated for 5½ months before trial. On virtually the eve of the trial, Querques found out, through no fault of his own (and certainly no fault of Romano's) that he could not appear. (JA 340-346; 189-190).

Petitioner pleaded with the trial court not to compel him to be represented by Markowitz, who was under subpoena as a government witness against him, but to give him time to obtain counsel "who studied this case." (JA 16a-17a). Markowitz stated that he was unprepared, that he had not read the 7,000 pages of testimony by the Government's witnesses concerning these same conspiracies in another trial, and that he "wasn't able physically to take on this case involving that much time and that much effort." (JA 55a). The trial court, however, stating that this was an uncomplicated case not requiring a reading of the prior testimony of the same Government witnesses (JA 55a), forced

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[20] See, e.g., *United States v. Johnston*, 318 F.2d 288 (6 Cir. 1963); *Lee v. United States*, 235 F.2d 219 (D.C. Cir. 1956); *Releford v. United States*, 288 F.2d 298 (9 Cir. 1961); *Gomez v. Heard*, 218 F. Supp. 228 (S.D. Tex. 1962), *aff'd*, 321 F.2d 88 (5 Cir. 1963); *United States v. Bergamo*, 154 F.2d 31 (3 Cir. 1946); *United States v. Mitchell*, 354 F. 2d 767 (2 Cir. 1966); *United States ex rel. Davis v. McMann*, 386 F.2d 611 (2 Cir. 1967), *cert. denied*, 390 U.S. 958 (1968).

Arnold Romano to be represented by Markowitz ("You have got him whether you accept him or not." JA 17a).[21]

The Court of appeals is patently wrong in suggesting that an attorney could prepare for this complex conspiracy trial in its midst (App., Slip Op. 1253).[22] To pin down the inexact and forgetful Hedges on crucial dates would have required the most carefully planned cross examination and cross referencing to prior testimony.[23]

This is the only federal decision to uphold a conviction where the accused arranged for his counsel well in advance of trial, the retained attorney failed to appear due to circumstances beyond the accused's control or anticipation.

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[21]The Court of Appeals is in error in stating that the petitioner Arnold Romano was permitted to proceed *pro se*. Against petitioner's will and over his objections (JA 14a, 16a-17a, 32a-33a, 46a-47a, 253a, 776a, 863a-864a, 936a), the court ordered Markowitz to participate and to present summation to the jury. (JA 31a-33a, 809a-810a, 930a, 960a, 1140a.) The summation contained a critical error on a date affecting petitioner's statute of limitations defense. (JA 157a, 162a, 967a.) Thus, the undesired representation forced on petitioner proved prejudicial. Cf. *Price v. Johnston*, 334 U.S. 266, 285 (1948); *United States ex rel. Maldonado v. Denno*, 348 F.2d 12 (2 Cir. 1965), *cert. denied*, 384 U.S. 1007 (1966); *Minor v. United States*, 375 F.2d 170, 172 (8 Cir.), *cert. denied*, 389 U.S. 882 (1967).

[22]The Court's reference to Markowitz's assertion of readiness for trial "through November 1968" (App., Slip Op. 1252), is flatly contradicted by the record. The record shows that Markowitz had stated in November *1966* that he was ready for trial (JA 90). Of course, had the trial been calendared in 1966, Markowitz would have had several months from its calendaring to read transcripts and plan cross-examination.

[23]Nor was petitioner Dominick Romano's trial counsel prepared for this kind of cross-examination. During the pre-trial coordination among defense counsel, it had been agreed that Querques would conduct the bulk of cross-examination regarding Hedges (JA 250a, 252a). Thus, petitioner Dominick Romano was also prejudiced by the non-appearance of Arnold's retained counsel. See *Glasser v. United States*, *supra*, 315 U.S. at 76-77.

and the accused was forced to trial with an attorney he did not want.

The sudden absence of counsel is a chronic problem, and trial courts are sorely in need of guidance. The federal decisions provide a basis for such guidance. The instant decision of the Court of Appeals that "every case must be judged upon its own set of facts" (App., Slip Op. 1250) not only fails to provide such guidance, but it may well pave the way for the destruction of the cohesion that has already emerged from its own decisions and that of other Courts of Appeals. This Court should review the decision.

III. The rule applied in this case, that the right to a speedy trial is waived if not formally demanded, is followed in a majority of jurisdictions but has been repudiated by the Solicitor General and by the ABA Criminal Justice Project.

"Many—if not most—of the basic questions about the scope and context of the speedy trial guarantee remain to be resolved." *Dickey v. Florida*, 90 S. Ct. 1564, 1578 (1970) (Mr. Justice Brennan, concurring). This case presents an excellent opportunity to resolve some of the most vexing of these basic questions: Is the right forfeited if the defendant fails to "demand" a speedy trial? Can undue delay be measured by an absolute time period, after which prejudice is presumed conclusively? If prejudice is not presumed conclusively, is the burden on the Government to show its absence?[24] Does delay attributable to the defendant (*e.g.*, through fugitivity) excuse subsequent undue delay on the part of the prosecution?

[24]The record contains no affirmative showing of prejudice from the delay, apart from the witnesses' inability to recall crucial dates—the type of prejudice inherent in any delayed trial. The opinion below does not discuss the point, apparently because the Second Circuit presumes prejudice in such a case, even where, as here, no special prejudice appears in the record. *United States v. Lustman*, 258 F.2d 475 (2 Cir.), *cert. denied*, 358 U.S. 880 (1958).

On all of these critical questions, in the absence of direction from this Court, there will continue to be inconsistencies among federal circuit courts, within circuits, between federal and state courts, and among the state courts regarding this fundamental constitutional right. See *Dickey v. Florida, supra*, at 1569-1578.

The present case involves a delay of more than two years from petitioner Arnold Romano's arrest in July, 1966, until the government produced him for trial in August, 1968. (JA N.Q) During that entire period, Romano was in federal custody, having been convicted of bail jumping and sentenced to prison for five years.[25] No less than five times, approximately two years before the Government finally chose to bring him to trial, Arnold Romano urged on the record that this case be put on the calendar for trial. (JA 67, 92-93). The Government, however, first chose to go forward in the bail jumping case and then delayed almost two years more before proceeding in this case. In December, 1967, about a year and three months after the bail conviction, Romano served the government with a *pro se* motion to dismiss because of denial of a speedy trial. (JA 62, 75) Still the Government did nothing to calendar the case until eight months later.[26]

The basis of the decision below, that there was no denial of the right to a speedy trial, is that Arnold Romano made no "demand." To reach this result, the Court held that Romano's efforts to have the narcotics case tried be-

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[25]Prior to his arrest in July, 1966, Romano was a fugitive for fifteen months, during which time six alleged co-conspirators were tried on the same narcotics indictment. See *United States v. Armone, supra.*

[26]This delay alone is twice as long as the four-month maximum period from arrest to trial recommended by the *President's Commission on Law Enforcement and the Administration of Justice*, "The Challenge of Crime in a Free Society," p. 155 (1967); see also *ABA Project on Minimum Standards for Criminal Justice*, "Standards Relating to Speedy Trial," sec. 2.1, Comment to sec. 2.1, p. 14 (Approved Draft, 1968).

fore the bail case could not be treated as "demands." (App., Slip Op. 1257) In addition, the Court failed to recognize that service on the Government in December, 1967, of Romano's *pro se* motion to dismiss (JA 75)[27] was itself an adequate demand, and that it was followed by eight months' additional delay.

In reaching its conclusions that a "demand" was required, and that the demand must meet certain formalistic requirements, the Court of Appeals relied on its own earlier decision in *United States v. Lustman*, 258 F.2d 475 (2 Cir.), *cert. denied*, 358 U.S. 880 (1958). However, the *Lustman* view, although followed in a majority of jurisdictions,[28] has been rejected by the Solicitor General of the United States and by the American Bar Association's Criminal Justice Project. The Solicitor General, rejecting the *Lustman* notion that a demand must be in a particular form, asserted that a defendant who desires a prompt trial need only notify the government by "requesting" it.[29] In the present case, petitioner Arnold Romano clearly put the prosecution on notice of his desire to proceed. Thus, the decision below holds for the Government on a ground that has been specifically repudiated by the Solicitor General.

This Court should therefore grant review in order to establish that (1) the right to a speedy trial is not waived by the defendant's failure to make a formal "demand"; (2) two

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[27]The Court of Appeals, in noting this *pro se* motion, erroneously refers to the date of oral argument on the motion (March, 1968), rather than the date of service (see JA 62, 75; App., Slip Op. 1257).

[28]See Note, *The Right to a Speedy Criminal Trial*, 57 Colum. L. Rev. 846 (1957).

[29]Brief in Opposition to Petition for Certiorari, *Maxwell v. United States*, No. 750 Misc. Oct. Term, 1967, at page 3. The ABA, going further, would dispense entirely with any requirement of affirmative action by the accused to avoid waiver of the right to a speedy trial. ABA Project on Minimum Standards for Criminal Justice, op. cit., *supra* note 26, at 17, quoting with approval, Note, *The Right to a Speedy Criminal Trial*, op. cit. *supra* note 28, at 853.

years' delay between arrest and prosecution violates the right even if the defendant cannot prove specific prejudice on the face of the record; and (3) delay attributable to the defendant (in this case through fugitivity) does not excuse subsequent undue delay by the government.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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August 1, 1970

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 185-88—September Term, 1969.

(Argued October 10, 1969 —Decided January 29, 1970.)

Docket Nos. 33632-34, 33685

UNITED STATES OF AMERICA,

Appellee,

—against—

CARMINE GUANTI, ARNOLD ROMANO, DOMINICK ROMANO and FRANK SHERBICKI,

Appellants.

Before:

WATERMAN, MOORE and KAUFMAN,

Circuit Judges.

Appeals from judgments of conviction entered in the United States District Court for the Southern District of New York after a trial before Lloyd F. MacMahon, *Judge*, and a jury. The indictment, filed September 30, 1964, charged conspiracy to violate the Federal Narcotics Laws, 21 U.S.C. §§173, 174 (1964). The jury returned a verdict of guilty as to each of the four defendants.

Affirmed.

ARNOLD E. WALLACH, New York, N. Y. (Joseph Panzer, New York, N. Y., of counsel), *for Appellant Guanti.*

MONROE H. FREEDMAN, Washington, D. C., and RALPH J. TEMPLE, Washington, D. C. (Freedman & Temple, Washington, D. C., of counsel), *for Appellant Arnold Romano.*

DAVID B. ISBELL, Washington, D. C. (E. Edward Bruce, Washington, D. C., Covington & Burling, Washington, D. C., and James M. LaRossa, New York, N. Y., of counsel), *for Appellant Dominick Romano.*

H. HOWARD FRIEDMAN, New York, N. Y., *for Appellant Sherbicki.*

MICHAEL W. LEISURE, Assistant United States Attorney, New York, N. Y. (Robert M. Morgenthau, United States Attorney for the Southern District of New York, New York, N. Y., Maurice M. McDermott and Charles B. Updike, Assistant United States Attorneys, New York, N. Y., of counsel), *for Appellee.*

MOORE, *Circuit Judge*:

The defendants Carmine Guanti, Arnold Romano, Dominick Romano and Frank Sherbicki appeal from judgments of conviction following a two-week trial before court and jury. The indictment, filed in 1964, charged in a single count twelve defendants and sixteen named co-conspirators with conspiracy to violate the Federal Narcotics Laws, 21 U.S.C. §§173, 174. The appellants here and two co-defendants were fugitives when the first trial of the indictment took place in 1965. At that first trial four defendants were found guilty and two were acquitted. The judgments were

affirmed. *United States* v. *Armone*, 363 F.2d 385 (2d Cir.), *cert. denied*, 385 U.S. 957 (1966). The four defendants now appealing were apprehended after the conclusion of the first trial. Their trial was in March, 1969.

By way of brief introduction, the government claims that the appellants, together with the co-defendants and co-conspirators, were engaged in a conspiracy from 1956 through 1960 to import huge amounts of heroin into the United States from France and to distribute the drugs after their illicit importation; that the conspiracy had three pairs of exporter-courier links which delivered the heroin to an importer link in New York; that three of the defendants here were involved in the import link—the Romanos and Sherbicki; and that the defendant Guanti was the receiver link and was more closely tied to the wholesaler link as a messenger for them.

The activities of the import link are most important here since the claim is made that there were two conspiracies and that the Romanos, as members of the so-called Cahill group, either abandoned, or were excluded from, the continuing conspiracy before the statute of limitations cut-off date of September 30, 1959. The government characterizes the importers as a group having a proprietary interest and several assistants. At the core were Joseph Armone, Stephen Grammauta, and the defendant Arnold Romano. Dominick Romano and Frank Sherbicki, both defendants here, are said to have been assistants. Three other members of this group would take delivery of the heroin when it entered this country. Initially, the couriers delivered it to Joseph Cahill. Then as the conspiracy progressed, Cahill transferred this function to Charles Hedges and Nicholas Calamaris. Hedges was the chief government witness both at this trial and in the 1965 trial.

The evidence reveals how each of the pairs of export courier links made initial contact with Cahill and how Hedges was later worked into the deliveries to the import group after his release from prison in the Spring of 1958. As Hedges became more trusted, he was introduced to more of the principals in the conspiracy and became more familiar with their dealings. He went with Cahill to take delivery of the heroin from the couriers; he met the wholesalers and made deliveries to them; he carried money back and forth between various principals; he recounted events which linked each of the defendants here with the conspiracy.

The details of each event and how various deliveries and payments were made during the five-year period involved need not be given *in extenso*. The relevant facts relating to the claims of error will be considered in the discussion of these claims.

All appellants adopt the arguments of their co-appellants insofar as they may aid their own positions. Since each appellant claims specific reversible errors as to him, they are best dealt with separately.

ARNOLD ROMANO

Deprivation of Counsel

Arnold Romano (Arnold) for his first point asserts (in his brief) that he was denied his right to counsel because he was "forced to trial in the unexpected absence of his retained counsel" and because he had "an attorney whom he did not desire and who was not prepared to defend him." The many decisions in this Circuit cited by this appellant and by the government are of little assistance in resolving this issue. If any principle is to be gleaned therefrom, it is that every case must be judged upon its own set of facts.

Somewhat analogous fact situations are to be found in cases in which similar contentions have been accepted and in others rejected. The proposition that the Sixth Amendment guarantees the right to counsel of one's own choosing is merely the preamble to the many exceptions which the courts have superimposed upon this fundamental privilege. Therefore since the facts seemingly control, we must turn to them.

On October 8, 1964 upon arraignment Arnold appeared by counsel, presumably of his choice, David M. Markowitz, who continued in such capacity at least through 1967.

On April 27, 1965, the date on which the trial was to commence, Mr. Markowitz appeared for Arnold; Arnold did not, preferring to flee and jump his $50,000 bail.

In July 1966 Arnold was reapprehended and thereafter was tried and convicted of bail-jumping. Even then Mr. Markowitz, still his counsel, represented to the Court that "we are prepared to go to trial in the narcotics conspiracy case at any time."

As late as December 27, 1967 Arnold by affidavit averred that his defense was prepared and that he was ready for the narcotics trial.

On October 8, 1968 a New Jersey attorney, Michael A. Querques, filed a notice of appearance for Arnold but Mr. Markowitz was designated therein as local counsel.

On November 20, 1968 Mr. Querques moved on behalf of Arnold to dismiss the indictment, Mr. Markowitz by affidavit still asserting Arnold's readiness to proceed to trial.

As early as October 1968 Mr. Querques (and undoubtedly his client) knew that the narcotics trial would be set for March 1969 in the Southern District of New York and on February 7, 1969 knew that March 3, 1969 was fixed for its commencement. And on February 27, 1969 Mr. Querques stated that he would be present.

The next day, Friday, February 28, 1969, however, in the late afternoon Mr. Querques notified Government counsel of a conflicting New Jersey trial engagement for the following Monday, March 3rd, which would require his services for at least a month. Despite telephonic communication between the New Jersey and the New York judges, the New Jersey judge refused to yield and ordered Mr. Querques to remain in court in New Jersey, thus creating an irresistible force against an immovable body situation.

Having made all preparations months in advance for a multi-defendant narcotics conspiracy trial, the New York trial judge could scarcely allow the other defendants and their counsel to remain in idleness on the sidelines for a month or more if any reasonable solution protective of Arnold were available. He chose to find the solution in Mr. Markowitz, who had been prepared in April 1965 and whose preparedness had been reasserted at least through November 1968.

Without impugning Mr. Querques' position or belittling the dilemma in which he found himself, this court must try to put itself in the trial court's shoes. The reasons given by Arnold and Mr. Markowitz were scarcely reassuring. The trial court had to take some immediate action. There were several possibilities. It could allow Arnold to represent himself as Arnold requested. Such a course might well have been made the basis for appellate argument of trial without counsel. The court could have assigned Mr. Markowitz for all purposes but, had it done so, this Circuit's decisions of the constitutional right of *pro se* representation might have caused future difficulties. Rather than founder on the shores of a Scylla or Charybdis, the Court chose a middle course, thus giving Arnold as much of himself and as much of Mr. Markowitz as he might wish.

to take. It directed Mr. Markowitz to sit with, and be available to, Arnold throughout the trial so that Arnold was enabled to proceed *pro se* with the added advantage and protection of counsel—for four years at least of his own choice.

The *in terrorem* argument of the 7,000 pages of the April 1965 trial record which Mr. Markowitz claims he would not have had time to read is not impressive. Experienced trial counsel could have culled the essential portions of that record within the allotted time.

The trial record before us convincingly discloses that Arnold, short of disrupting the trial to wait for Mr. Quesques, was given every opportunity to examine and cross-examine *pro se* or by counsel and to participate in argument or to remain mute. Any action that the trial court could have taken (except delay) would have been subject to the claim of error. Moreover, Arnold's failure to take full advantage of Mr. Markowitz' talents was of his own choosing. We find that he was not deprived of any constitutional right to counsel on the record presented to us and that the trial court was entitled to rely on our opinion in *United States* v. *Bentvena*, 319 F.2d 916, 936 (2d Cir.), *cert. denied* sub nom., *Ormento* v. *United States*, 375 U.S. 960 (1963) in which it was said that "if a defendant does not give the court adequate notice that his retained counsel will be unable to attend the trial, the trial court may, in the exercise of its sound discretion, do what is reasonably necessary to meet the situation."

The Alleged Dual Conspiracies

Arnold as a second point asserts that there were multiple conspiracies and that the trial court's charge was at variance with *United States* v. *Borelli*, 336 F.2d 376 (2d Cir.

1964), *cert. denied* sub nom., *Cinquegrano* v. *United States*, 379 U.S. 960 (1965); and *United States* v. *Kelly*, 349 F.2d 720 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966). This argument, however, is premised on the assumption that there were two separate conspiracies in fact. To create the separate conspiracies theory, appellants artificially divide the conspiracy into a "Cahill group" and a "Calamaris group."

In an endeavor to simplify the facts relating to this claim and in the interest of clarity despite some repetition, a heroin export group existed in France consisting of Barnier (Paris), the Aranci brothers (Marseilles) and another (not named). They used as couriers to bring the heroin into this country Bourbonnais (an airline purser), Aspelund (a merchant seaman), Roulet (an airline employee), Henripierre (who accompanied Roulet), Rosal (Guatemalan Ambassador to Benelux countries), and Tarditti. The couriers delivered the heroin to an import group consisting at various times of Cahill, Arnold Romano, Dominick Romano, Hedges, Armone, Calamaris, Grammauta, and Sherbicki. To put the heroin into the hands of a wholesale group, that group used the defendant Guanti as a conduit. The Government alleged that this conspiracy continued from 1956 through 1960. The money for the heroin was paid by the wholesalers to various members of the import group. In Aspelund's case, Cahill paid him and he in turn paid Aranci less a delivery commission. Bourbonnais was likewise paid by Cahill. Subsequently, Hedges became associated with Cahill and would receive payments which he would turn over, according to his testimony, to Cahill, Grammauta, Armone, Calamaris, Arnold Romano, or Sherbicki.

Because of the alleged cut-off date (statute of limitations) of September 30, 1959, events thereafter assume

importance. In December 1959 Bourbonnais, Calamaris and Tarditti (an intermediary) met with Rosal in New York. Tarditti and Rosal removed three suitcases from the taxi in which Rosal arrived and placed them in Calamaris' car. Additional suitcases were delivered by Tarditti and Rosal to Bourbonnais in April 1960 and July or August 1960. The contents were turned over to Calamaris on Barnier's directions. Also in 1960 Pacelli (a wholesaler), Hedges and Armone negotiated, and Calamaris effected, the delivery of three kilos to Hedges. Hedges, dissatisfied with his commissions, discussed an increase with Arnold who agreed with him. In 1960 Cahill gave Hedges $10,000 in cash to deliver to Arnold in Miami which Arnold received at the airport.

The denouement came in October 1960 when Bourbonnais, Calamaris, Rosal and Tarditti were arrested. 52 kilos of heroin and $26,000 in cash were found in the taxi trunk and $42,000 in cash in the Calamaris car, in various packages. From Bourbonnais was obtained a notebook revealing the packages delivered to Calamaris and the money received. These events were sufficient to warrant the factual conclusion that the conspiracy had not terminated by the prescriptive cut-off date of September 30, 1959, and that Arnold had not withdrawn therefrom with finality prior to that date.

Claimed Withdrawal From the Conspiracy

As to withdrawal and the refusal to recall Hedges, Hedges testified that he had a conversation with Arnold in which Arnold said: "When my brother Dom and I had this, there was no trouble. We made a living out of it and now it is too involved." The date of this conversation and whether it meant that the Romanos were out of the business

or getting out were questions for the jury. It seems likely that the date was in 1960. The defendants presented co-conspirator James Godwin, who testified that late in 1959 he overheard a conversation between Hedges and Arnold in which Arnold exhorted Hedges to get out of the business, saying that he himself had been out for a "long time." Based on this testimony, there was a request to recall Hedges. This request was denied. Defendants' counsel had failed to cross-examine Hedges on the question of withdrawal. The government made efforts to locate Hedges which were fruitless. Hedges had gone into hiding; he had already been shot. The court took "judicial notice of the state of Hedges on the stand who was observed as terrified." The defendants surely knew the importance of their withdrawal defense and that the conversation with Hedges was relevant thereto. They should have cross-examined more thoroughly if they so desired. The Romanos were not denied the opportunity to present evidence and argument on their claimed defense of withdrawal. But from the evidence adduced, the jury could properly conclude that they had not withdrawn from the conspiracy on or before the date of the statutory bar.

Speedy Trial

Arnold asserts that the record reveals a denial of his Sixth Amendment right to a speedy trial. The facts reveal that Arnold was first arrested in July 1964. When the first trial on the narcotics indictment was held in May 1965, Arnold failed to appear and forfeited his $50,000 bail. He was reapprehended in July, 1966 and was tried, convicted and sentenced to five years' imprisonment for bail jumping. Several times during the pendency of the bail jumping action, Arnold's counsel sought an adjourn-

ment by urging that the narcotics indictment should be tried first. These requests for an adjournment cannot be treated as demands for a trial of the narcotics indictment.

From the time of his sentencing in October 1966 for bail jumping until March 1968, Arnold made no effort to have the narcotics indictment brought to trial. In March 1968 he moved to dismiss for lack of prosecution. This motion was denied on May 17, 1968 for failure to make the demand required to preserve the right to a speedy trial as required by *United States* v. *Lustman*, 258 F.2d 475 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958) and *United States* v. *Maxwell*, 383 F.2d 437 (2d Cir. 1967), *cert. denied*, 389 U.S. 1043 (1968). Arnold was then produced for trial in August 1968. A renewal of his motion to dismiss was denied on November 26, 1968 since the recent delay could be attributed to Arnold's efforts to procure counsel. The following day the case was assigned for a March 1969 trial. We find no error in the denial of these motions. The record reveals no denial of the Sixth Amendment right to a speedy trial.

Dominick Romano

Conceding (in his brief) that "There was evidence of an active conspiracy involving both an exporter at one end and the wholesalers at the other, occurring well after September 30, 1959, the cut-off date of the statute of limitations, Dominick Romano (Dominick), who claims to have been on the periphery of any conspiracy at best, argues that his association was only with the Cahill group which he asserts was replaced by the Calamaris group prior to September 30, 1959 and, hence, that the statute of limitations protects him. On appeal, Dominick contends that only two items of direct evidence and two of hearsay, all prior to September 30, 1959, connect him in any way with Hedges

and Arnold in the conspiracy. In general, Dominick follows the factual analysis which Arnold makes in an attempt to prove that he was only in the Cahill group. Thus, Dominick states that the evidence "showed that one import group, to which the slight proof as to Dominick Romano tended to connect him, was cut off and replaced by another import group more than the prescriptive five years before the indictment."

Dominick thus primarily places his defense upon the theory that prior to September 30, 1959 he had withdrawn from the conspiracy. Such a determination, however, was for the jury. Tacitly recognizing this conclusion, Dominick attacks the jury charge in that it "failed to require an individual determination with respect to the scope of any conspiratorial agreement shown as to Dominick Romano" and that it "failed to require the jury to find the necessary connection between Dominick Romano and the two overt acts charged which were not barred by the statute of limitations." Dominick's argument is based on the fallacious assumption that his "Cahill group" conspiracy ended with Cahill's replacement by Calamaris; that Dominick was associated solely with Cahill; and that, *ergo*, Dominick's participation automatically ceased. Dominick misconceives the nature of a continuing conspiracy, which may be likened to a theatrical performance in which many actors enter upon the stage to play their assigned roles and, having fulfilled their parts, they withdraw. Their individual withdrawals, however, do not terminate the performance or change their status as members of the cast.

The much-relied-upon *Borelli* and *Kelly* cases do not aid Dominick's cause. The mere substitution or use of a Hedges and a Calamaris as a link in the importation of heroin did not create separate or multiple conspiracies.

As to sufficiency of evidence, Dominick did go to a hotel, the Fifth Avenue, where in a room taken by Cahill under a different name, he received a package of heroin from Hedges, and later to the Commodore where he discussed with Hedges the risks of hotel room operations and the possibility of his taking over Hedges' job. He was also connected with the conspiracy through his brother's (Arnold) statement that "When Dom and I had the business it was all right, but now it is getting too complicated."

Dominick also argues that he was "fatally prejudiced" by what he now refers to as a "Denial of Adequate Representation by Counsel" to his brother Arnold. Dominick was represented by his own counsel who had every opportunity to examine and cross-examine the witnesses. Every appellate counsel can speculate on appeal as to what might have happened had other or different trial tactics been pursued. However, speculation cannot replace actuality. If counsel for the other co-defendants failed to take full advantage (in retrospect) of their then opportunities, they cannot successfully claim this failure as a ground for appellate reversal.

CARMINE GUANTI

Guanti bases his appeal upon the theory that his Fifth Amendment rights against self incrimination were violated by the trial court's charge and upon a multiple conspiracies argument. He concedes that the proof established that he received packages of heroin from Hedges but claims that there was no proof that he knew that the heroin was imported. Hoping that heroin will be treated by the Supreme Court in the same way in which it considered marijuana in *Leary v. United States*, 395 U.S. 6 (1969), Guanti pointed to the grant of certiorari by the Supreme Court, 395 U.S.

933 (1969) in *United States* v. *Turner*, 404 F.2d 782 (3d Cir. 1968). However, this issue has now been resolved as to heroin by the Supreme Court's decision on January 20, 1970, wherein that Court said:

> "'Common sense,' *Leary* v. *United States*, [395 U.S. 6, 46 (1969)] tells us that those who traffic in heroin will inevitably become aware that the produce they deal in is smuggled, unless they practice a studied ignorance to which they are not entitled. We therefore have little doubt that the inference of knowledge from the fact of possessing smuggled heroin is a sound one; hence the court's instructions on the inference did not violate the right of Turner to be convicted only on a finding of guilt beyond a reasonable doubt and did not place impermissible pressure upon him to testify in his own defense." *Turner* v. *United States*, 38 U.S.L.W. 4103, 4109 (U.S. Jan. 20, 1970) (footnotes omitted).

See also our recent decision to this effect in *United States* v. *Cuadrado*, 413 F.2d 633 (2d Cir. 1969).

In addition Guanti contends that at most he was guilty only of substantive offenses, that he merely received the heroin, that there is no proof of any agreement with others to import and that being solely involved with Hedges, he should not have been contaminated by the proof relating to others.

The proof is more than sufficient to establish Guanti as the receiving link, quite apart from the gratuitous (as to Guanti) concession in the chart in Arnold Romano's brief that Guanti played this role. His multiple conspiracy and the *Borelli* charge arguments have been discussed with respect to his co-defendants.

FRANK SHERBICKI

Sherbicki asserts as "prime points" of his appeal an alleged deprivation of a speedy trial and a failure of the trial judge to disqualify himself.

Sherbicki has not always sought a speedy trial. His trial could have been held in May 1965 with his then co-defendants but he preferred to avoid trial by becoming a fugitive. He was not recaptured until August 1965. His first motion thereafter for dismissal (November 1965) as well as his second (March 1966) were properly denied because there had been no unreasonable delay in assigning the case for trial. During the next two years, Sherbicki was serving part of a five- to ten-year New York State sentence and did not make any motion for a speedy trial. The third motion was denied (December 12, 1968) because the case had been assigned for trial in March 1969.

A fourth motion was made at the opening of the trial on March 3, 1969. When counsel for Sherbicki advised the trial judge that he intended to call him (the trial judge) as a witness, he quite properly referred the motion to another judge who denied a hearing and characterized the "speedy trial" claim as requiring "thick-skinned audacity" to press.

Sherbicki also advances the argument that the government failed to prove either overt act 10 or 14 as charged in the indictment. However, the Hedges-Armone conversation regarding the $50 per kilo increase for delivery services and the package-behind-the-radiator delivery in July 1960 by Sherbicki were matters for jury determination.

THE CHARGE

Appellants Arnold and Dominick Romano strongly contend that there was error in giving the same "all-or-nothing" charge condemned in *United States* v. *Borelli, supra,* and *United States* v. *Kelly, supra.* The trial court charged the jury that all of the defendants must be acquitted if more than one conspiracy had been proved or if a single conspiracy did not continue beyond September 30, 1959. He directed the jury's attention to the fact that the government contended that there was a single conspiracy proved and that the defendants contended that there were two—one with a Cahill group as importers and one with a Calamaris group as importers. The trial judge was careful, when marshaling the evidence, to say that the jury could convict some, all, or none of the defendants as members of the conspiracy—hardly an "all or nothing" charge. Defendants also say that the court should have charged on subsidiary conspiracies—but unlike *Borelli,* which involved a multi-linked conspiracy of importers, exporters, and wholesalers widely separated in time and location, here there was basically a core conspiracy of importers, with the addition of Guanti, their connection to the wholesalers. The jury was also charged that it must determine separately as to each defendant whether he knowingly and wilfully became a member of the conspiracy charged. It is unwise to create the label, a *Borelli*-type or a *Kelly*-type charge, as a guide or standard for general future use in conspiracy cases. Each of the cases had to be reviewed and analyzed upon the specific fact situations there presented.

The government seeks to distinguish *Borelli* and *Kelly* by saying that there is here no problem of a defendant having only a limited knowledge of the scope of the conspiracy charged. A *Borelli*-type charge is said to be for

protection in cases where the jury must focus on the scope of the agreement and on problems of limited participation and knowledge. The only issues here, the government argues, are (a) whether the conspiracy continued beyond the limitation period and (b) whether the Romanos withdrew from the conspiracy prior to the time the statute of limitations barred their prosecution.

The evidence was not ambiguous as to the scope of the conspiracy. It was obviously to import and distribute heroin. *Borelli* emphasizes the ambiguity of the evidence as to the scope of the agreement made by a particular defendant. 336 F.2d at 386 n. 4. *Kelly* requires that the jury clearly recognize the difference between the evidence against each defendant. 349 F.2d at 757. The jury was properly instructed to consider the proof against each defendant individually. The issue is really whether the conspiracy continued beyond September 30, 1959 and whether there was a withdrawal by the Romanos before that date. Both of these issues have been resolved above.

There is also assigned as error a supplementary charge given to the jury after it had been out for 24 hours. The jury returned a verdict of guilty as to all defendants 5 to 20 minutes after the supplementary instruction. The jury requested the summation of Dominick's counsel. Since this was not evidence, the request was denied. The trial judge then gave a restatement of the elements of conspiracy with a statement of the law relating to withdrawal. He did not give a specific charge as to Dominick since he feared that that would suggest that withdrawal was the only issue as to him or that only his guilt was questionable. This was not objected to as an erroneous statement of law but as unresponsive to the request. There was no error in giving this instruction.

Judgment affirmed.

33632-4, 33685

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALFRED ARMONE, *et al.*,
Defendants,

CARMINE GUANTI, ARNOLD ROMANO, DOMINICK ROMANO and FRANK SHERBICKI,
Defendants-Appellants.

(and 3 other cases)

A petition for a rehearing having been filed herein by counsel for appellants Dominick Romano and Arnold Romano,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is

DENIED

/s/ Sterry R. Waterman
Leonard P. Moore
Irving R. Kaufman
Circuit Judges

June 2, 1970

33632-4, 33685

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALFRED ARMONE, *et al.*,

Defendants,

CARMINE GUANTI, ARNOLD ROMANO, DOMINICK ROMANO and FRANK SHERBICKI,

Defendants-Appellants.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for appellants Arnold Romano and Dominick Romano and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ J. Edward Lumbard
Chief Judge

June 2, 1970

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 478

ARNOLD ROMANO AND DOMINICK ROMANO, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 5504

FRANK SHERBICKI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 5591

CARMINE GUANTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a joint trial by jury in the United States District Court for the Southern District of New York,

petitioners were convicted of conspiracy to violate the federal narcotics laws, 21 U.S.C. 174. The crime involved an agreement to import large amounts of heroin from France and to distribute the drugs after their illicit importation. The pertinent facts of the complicated scheme are set forth in sufficient detail in the opinion of the court of appeals (421 F. 2d 792, 796–797; see Pet. App. A 2–3, 7–9 in No. 478).

1. Petitioners Arnold and Dominick Romano and Guanti[1] contend that the trial judge's instructions that the jury had to find a single conspiracy or no conspiracy at all constituted a type of "all or nothing" charge condemned by the Second Circuit in prior cases. This contention is answered in the opinion below, which also relates the evidence from which the jury could reasonably conclude that petitioners were part of a single continuing conspiracy from 1956 to 1960 (421 F. 2d at 796–798; Pet. App. A 16–17 in No. 478).

2. Petitioner Arnold Romano argues that he was denied the right to counsel of his own choosing because the trial judge refused to grant a continuance to permit him to obtain new counsel when it became apparent three days before the scheduled trial date that his retained attorney would be unable to appear. The judge appointed attorney David Markowitz to assist petitioner; he had been petitioner's retained counsel at least through 1967 and had previously asserted his

[1] The petitions of Sherbicki and Guanti are out of time under Rule 22(2) of the Rules of this Court.

readiness to go to trial on the instant charges.[2] The district judge was presented with the task of weighing a variety of competing factors. As the court below properly concluded he reached a balanced decision well within his discretion in denying a continuance. See 421 F. 2d at 795–796.

3. Petitioner Arnold Romano argues that the "failure to demand a speedy trial rule" upon which the court of appeals relied in disposing of his contention in this regard (see 421 F. 2d at 798) has been rejected by the Solicitor General in a brief in opposition filed in the 1967 Term and that it is also inconsistent with a recent expression of views of the American Bar Association; accordingly, he asserts the issue is ripe for examination by this Court (Pet. in No. 478, pp. 16–18).[3] Whatever the desirability of examining this rule in an appropriate factual context[4] (cf. Mr. Justice Brennan concurring

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[2] Petitioner is correct in pointing out (Pet. in No. 478 p. 15, n. 22) that the court below was in error in asserting that Markowitz had declared his preparedness for trial "at least through 1968" rather than in 1966. The confusion is due to the fact that in 1968 Markowitz affirmed that he had been ready back in 1966. This factual misimpression, however, does not detract from the correctness of the court's opinion on this point.

[3] We note that the Second Circuit followed the majority rule in resting its decision on this ground. See, *e.g.*, *Bandy* v. *United States*, 408 F. 2d 518 (C.A. 8); *United States* v. *Jones*, 403 F. 2d 198 (C.A. 7), certiorari denied, 394 U.S. 947; *United States* v. *Maxwell*, 383 F. 2d 437 (C.A. 2), certiorari denied, 389 U.S. 1057. Nor is the majority opinion in *Dickey* v. *Florida*, 398 U.S. 30, inconsistent with the "demand" rule followed by the lower courts. The opinion in *Dickey* shows that petitioner there made repeated demands for a speedy trial. 398 U.S. at 32–33.

Nor did the government in its brief opposing certiorari in the *Maxwell* case (No. 750, Misc., O.T., 1967, certiorari denied, 389

in *Dickey* v. *Florida*, 398 U.S. 30, 39, 48–50), this is not the case. As the opinion of the court below makes clear (see 421 F. 2d at 798) a large portion of the delay was because petitioner was a fugitive and, after his capture, was tried and convicted of bail jumping (in July 1966). He is hardly in a position to argue that he was entitled to a trial on the narcotics charges first. Moreover, at no point has petitioner alleged that any prejudice stemmed from the delay (Pet. in No. 478, p. 19). In these circumstances, no further review is warranted.[4] See *United States* v. *Ewell*, 383 U.S. 116, 120, 122.

4. Petitioner Guanti complains that his co-conspirators' claim of withdrawal from the conspiracy in argument before the judge implied that (a) there was a conspiracy and (b) Guanti was still a member of it. He contends that he was thereby denied the right to "confrontation" by being tried jointly with these co-conspirators, notwithstanding that they did not testify. This argument which was apparently raised for the first time in a petition for rehearing is patently insubstantial.

Guanti also contends that testimony at trial by Hedges (an unindicted co-conspirator) concerning what "others did or said to him" violated his right to

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U.S. 1057) repudiate the demand requirement. The word "request" was used synonymously with "demand", and the government in *Maxwell* maintained that a motion to dismiss for lack of a speedy trial was inappropriate where a prior demand had not been made.

[4] The similar contention by petitioner Sherbicki is equally insubstantial in view of the factual context. Sherbicki's first two motions related to the delay caused by his own failure to appear at trial; his subsequent motions were made after the case had been scheduled for trial (J.A. 163). See also 421 F. 2d at 800.

confrontation (Pet. in No. 5591, p. 3). Hedges' testimony was, however, admissible under the co-conspirator exception to the hearsay and confrontation requirements. Cf. *Dutton* v. *Evans*, No. 10, set down for reargument this Term. Guanti's further contention that his participation in the conspiracy was not proved is answered by the trial record. The evidence showed that he was extensively involved in the criminal scheme as an active member with knowledge of the conspiracy's purposes and membership (*e.g.*, J.A. 100a–102a, 147a–149a, 154a–155a).

It is therefore respectfully submitted that the petitions for writs of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1970.

U.S. GOVERNMENT PRINTING OFFICE 19-0

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 478

ARNOLD ROMANO and DOMINICK ROMANO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Washington, D. C. · THIEL PRESS · 202 · 393-0625

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OCTOBER TERM, 1970

No. 478

ARNOLD ROMANO and DOMINICK ROMANO,

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UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Government's opposition to the petition for certiorari fails to meet the issues raised in the Petition for Certiorari.

1. *The "all or nothing" instruction in conspiracy trials.* The Government states that there was evidence "from which the jury could reasonably conclude that petitioners were part of a single conspiracy . . . ." But that does not meet the point, which is that the jury could equally have

concluded that there were two conspiracies—if it had been given the choice. The vice of the all or nothing charge is that it unfairly restricts the jury's options, requiring it to convict all defendants in order to convict any.

2. *Denial of the right to counsel.* The Government argues that the attorney, Markowitz, who was forced on petitioner Arnold Romano over his express objections, had previously represented him. But Markowitz was discharged specifically because Romano was dissatisfied with the prior representation. The cases cited at p. 14, note 20 of the Petition establish the principle emerging from all Federal decisions on the point, but never articulated by this Court—that an undesired attorney may not be forced on a defendant who is diligent in securing counsel of his choice.[1] To those cases should be added *Brown v. Craven*, 424 F.2d 1167 (1970), in which the United States Court of Appeals for the Fifth Circuit said:

> "[T]o compel one charged with grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever." (424 F.2d at 1170)

3. *Denial of a speedy trial.* The Government contends that this is not an appropriate case for review because "a large portion of the delay" was attributable to Arnold Romano's fugitivity. But the delay at issue is the two years *subsequent* to Romano's capture, during which time he was continually in federal custody.

Moreover, the Solicitor General has indeed endorsed Romano's position that a defendant need not make a formal "demand" of a speedy trial, but need only make

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[1] Petitioner, who was in prison, did not have "three days" notice that his attorney would not be available. The attorney himself did not learn of his inability to appear until the Friday afternoon before the Monday morning of the trial.

a "request" that is sufficient to put the Government "on notice" of his desire. The Solicitor General wrote:[2]

> ". . . If the government, *having been put on notice by this request*, refuses to comply, then the foundation for a claim of violation of the right to a speedy trial has been laid." (Emphasis added)

Yet the court below held that Romano waived a speedy trial because his requests failed to meet the requirements of a formal demand.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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September 4, 1970

[2] *Maxwell v. United States*, No. 750 Misc., Oct. Term, 1967, Brief in Opposition to the Petition for Certiorari, p. 3.